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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

No. 19

HAROLD FAHY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF ERRORS OF THE STATE OF CONNECTICUT**

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Supreme Court of Errors is reported at 149 Conn. 577 and at 183 A. 2d 256.

JURISDICTION

The judgment of the Supreme Court of Errors was entered on June 26, 1962. The petition for a writ of certiorari was filed on September 21, 1962, and granted on February 25, 1963. 372 U. S. 928. The jurisdiction of this Court is invoked under 28 U. S. C. §.1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment.

STATUTES INVOLVED

The statutes involved are Section 53-45 of the Connecticut General Statutes (1958 Rev.) as amended by Public Act 437 (1959) and Section 52-265 of the Connecticut General Statutes (1958 Rev.).

Section 53-45, as amended, provides in pertinent part:

"Injury to public buildings, furniture or voting booths. (a) Any person who wilfully injures any public building or wilfully places a bomb or other explosive device in any such building shall be fined not more than five thousand dollars or imprisoned not more than twenty years or both. . . ."

Section 52-265 provides in pertinent part:

"Action of supreme court on appeals and writs of error. On an appeal or writ of error, if the supreme court of errors finds errors in the rulings or decisions of the court below or of a judge thereof when the jurisdiction of any action or proceeding is or shall be vested in him, and unless it is of the opinion that such errors have not materially injured the appellant or plaintiff in error, it may render judgment in favor of the appellant or plaintiff in error, together with his costs; or may remand the cause to the court below or to a judge thereof having jurisdiction, to be proceeded with by such court or by such judge to final judgment, . . ."

QUESTION PRESENTED

May a violation of petitioner's constitutional rights properly be characterized by the Connecticut Supreme Court of Errors as harmless error not warranting a new trial where that Court found that evidence obtained through an illegal search and seizure was erroneously considered by the trier of fact and where the illegally seized evidence not only was recited in the finding of the trial court, but also formed the basis for the admission of other evidence of guilt which was likewise considered by the trier of fact?

STATEMENT

Petitioner was charged in an information dated February 10, 1960, with wilful injury to a public building in violation of Sec. 53-45 of the Connecticut General Statutes, a felony (R. 1-2). Petitioner pleaded not guilty and was tried before Bogdanski, J. in the Superior Court for Fairfield County at Bridgeport on June 28, 1960. He was found guilty as charged and sentenced to sixty (60) days in the County Jail at Bridgeport (R. 3-4).

On February 1, 1960, between the hours of 4:00 and 5:00 A. M. swastikas were painted with black paint in several places on the synagogue Beth Israel in the City of Norwalk, Connecticut (R. 11). At about 4:40 A. M. on that date, Officer Osborne Lindwall of the Norwalk Police Department stopped an automobile operating without headlights on a public highway in Norwalk about a block away from the synagogue (R. 11). Petitioner Fahy was driving this vehicle and William Arnold, also a defendant at trial, was a passenger therein.* Officer Lindwall searched the

*Defendant William Arnold joined in the petition for certiorari, but subsequently withdrew.

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vehicle and questioned defendants about their reason for being out at that hour. Defendants told him that they had been out for coffee at a diner and were returning to Fahy's home. In the course of searching the car, Officer Lindwall found a jar of black paint and a paint brush but did not remove them (R. 12). After completing his search and questioning the defendants, Officer Lindwall released them and they returned to Fahy's home (R. 12).

Later the same morning Officer Lindwall learned of the painting of the swastikas upon the synagogue. Thereafter, at approximately 7:30 A. M., he went to petitioner Fahy's home and, without possessing a search warrant or obtaining the permission of the petitioner, entered the garage located under the Fahy home and removed a jar of paint (State's Exhibit E) and a two-inch paint brush (State's Exhibit F) from a parked car (R. 12). Approximately two hours later, petitioner and William Arnold were arrested (R. 21).

At the trial, counsel for the defendants were precluded from examining Officer Lindwall in an effort to establish that the paint jar and the paint brush were obtained through an unlawful search and seizure. The trial court found that:

"Officer Lindwall testified that he went to the Fahy home on Wilson Point in South Norwalk before obtaining a warrant for the arrest of either defendant and before he had obtained a search warrant to search the premises, and entered the garage of the Fahy home which is situated under the house. He then removed the paint and paint brush allegedly used to apply paint to the Temple. Defendants' counsel was precluded by the Court upon the State's objection from pursuing his examination of Officer Lindwall in an effort to establish the unlawful search and seizure of the paint and paint brush." (R. 13)

The Supreme Court of Errors of the State of Connecticut nevertheless found sufficient facts in the record to es-

tablish that the search of the Fahy premises and the seizure of the paint jar and paint brush were unlawful and were in violation of petitioner's rights under the Fourteenth Amendment to the Constitution. Accordingly, it held that the trial court committed error in admitting the unlawfully seized paint jar and paint brush (R. 22).

The admission of unlawfully obtained evidence which was itself considered by the trial court in reaching its verdict (R. 12) also provided a basis for the admission of other damaging evidence. Thus the court found that:

"The two-inch paint brush matched the markings made with black paint upon the synagogue." (R. 12)

The admission of the paint jar and paint brush also corroborated and enhanced the credibility of the testimony of the state's leading witness, Officer Lindwall, to the effect that he had found a paint jar and paint brush under the front seat of Fahy's car while conducting a search of that vehicle at 4:40 A.M. on February 1, 1960.

Furthermore, at the conclusion of the prosecution's case the defendants testified in their own behalf and the court found that:

"Both defendants admitted that they were the ones who had painted the swastikas on the synagogue and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R. 12)

The Supreme Court of Errors of the State of Connecticut held that although the admission of the paint jar and paint brush had violated the petitioner's constitutional rights, a new trial would not be granted because the illegally obtained evidence had not materially injured the petitioner since there was other evidence of guilt adequate to support the conviction.

SUMMARY OF ARGUMENT

The admission in a criminal trial of evidence seized in an illegal search over the objection of the accused violates his constitutional right to have such evidence excluded. Where an accused has been tried in a manner which violates his constitutional rights, reversal is mandatory without regard to whether he can show that the judicial denial of his constitutional rights may have prejudiced the outcome of the trial.

Such a result is necessary to preserve respect for the courts as the guardians of our constitutional rights, to deter constitutional violations by undisciplined police officials, and to free appellate courts from speculation either as to the impact which the contaminated evidence had on the finder of fact or as to the impact it had on the accused in planning and conducting his defense.

In the instant case, the unconstitutional use of evidence tending to prove guilt was prejudicial to the accused and deprived him of a fair trial within the meaning of the Due Process clause of the Fourteenth Amendment. Testimony which connected petitioner with the crime could not have served that function without the contemporaneous use of illegally seized evidence. Moreover, the strength of the case thus unlawfully developed compelled petitioner to take the stand and testify as to the facts and circumstances of his conduct in an effort to show that such conduct was not within the scope of the felony statute under which he was charged. Such consequences were "fruit of the poisonous tree;" the inevitable consequence of allowing the State to base its case upon a constitutional violation.

Due process requires that the petitioner be granted a new trial conducted in accordance with constitutional guarantees.

Argument

I.

A NEW TRIAL IS REQUIRED WHERE CONVICTION FOLLOWS THE UNCONSTITUTIONAL USE OF UNLAWFULLY SEIZED EVIDENCE.

In *Mapp v. Ohio*, 367 U. S. 643, 655 (1961), this Court held that an accused has a right under the federal constitution to insist upon the exclusion from a state criminal proceeding of unconstitutionally obtained evidence. The Supreme Court of Errors of Connecticut, in affirming petitioner's conviction, recognized that constitutional error had been committed by the trial court but held, nevertheless, that the error was not of such stature as to require reversal because there was substantial other evidence in the record to support the conviction. The question thus posed is whether the action of a court in depriving an accused of his constitutional rights can ever be regarded as inconsequential.

A. The Failure to Follow Constitutionally Required Procedures Is Never Harmless Error.

There has been much divergence of opinion as to whether particular rights either expressly or impliedly contained in the Bill of Rights are also protected against state invasion by the Due Process Clause of the Fourteenth Amendment. However, once the Court has concluded that a particular concept of trial procedure is a fundamental right embodied in the Fourteenth Amendment, there has been no real dispute as to the effect of a state court's invasion of that right. Reversal is mandatory, without regard to whether the failure to afford the accused his constitutional rights may in fact have had a prejudicial effect on the outcome of the trial.

For example, this Court has held repeatedly that enforcement of rights guaranteed by the Fifth and Fourteenth Amendments requires reversal of all criminal convictions where unlawfully obtained confessions are admitted into evidence. *Lyons v. Oklahoma*, 322 U. S. 596, 597 (1943); *Malinski v. New York*, 324 U. S. 401, 404 (1944); *Rogers v. Richmond*, 365 U. S. 534, 545 (1960); *Haynes v. Washington*, —U. S.—, 31 U. S. L. Week 4492, 4496 (May 27, 1963). In *Lyons v. Oklahoma* this Court said:

"Whether or not the other evidence in the record is sufficient to justify the general verdict of guilt is not necessary to consider. The confession was introduced over defendant's objection. If such admission of his confession denied a constitutional right to defendant the error requires reversal." 322 U. S. 596, footnote page 597.

Similarly, in *Rogers v. Richmond*, the Court flatly rejected the contention that the constitutional violation might be overlooked if the coerced confession was truthful and hence not prejudicial:

"Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees." 365 U. S. at 541.

"A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession, such as is involved in this case, may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension." 365 U. S. at 544-5.

The coerced confession cases are clear in their holding that, once a coerced confession is admitted into evidence, the Due Process Clause is violated and a new trial required. Neither the truthfulness of the confession nor its effect upon the verdict are material. Likewise, in cases in which the Court has held that the accused had a constitutional right to counsel, the Court "does not stop to determine whether prejudice resulted" from a denial of that right. *Hamilton v. Alabama*, 368 U. S. 52, 55 (1961); cf. *Gideon v. Wainwright*, — U. S. — 31 U. S. L. Week 4291 (March 18, 1963). Again, in holding that trial by an eleven man jury violated the Fifth Amendment, the Court dismissed the " . . . suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. . . ." with the observation that "It is not our province to measure the extent to which the Constitution has been contravened" *Patton v. United States*, 281 U. S. 276, 292 (1929). Accordingly, once it has been determined that an unconstitutional trial procedure has been employed, it matters not that the procedure may in fact have been fair or the conviction well deserved. The error is grave, even though its effect on the accused may not be.

B. The Right to Have Unconstitutionally Seized Evidence Excluded from a Criminal Trial Is a Fundamental Right Guaranteed by the Due Process Clause and Not Merely a Rule of Evidence.

In *Wolf v. Colorado*, 338 U. S. 25 (1949) this Court held that the right of privacy expressed in the search and seizure clause of the Fourth Amendment also was a fundamental right protected from state infringement by the Due Process Clause of the Fourteenth Amendment. Thereafter in *Mapp v. Ohio*, 367 U. S. 643, 657 (1961) the Court held that the right of an accused to insist upon the exclusion of unconstitutionally seized evidence was an essential ingredient of both the Fourth and Fourteenth Amendments. In placing the right of exclusion on the level of constitutional doctrine the Court flatly rejected the proposition that it was a mere rule of evidence.

Although there were indications in a number of earlier cases that exclusion of illegally seized evidence from a federal criminal proceeding was an implied requirement of the Fourth Amendment, an independent ground for this requirement existed in the Supreme Court's superintending control over the federal judicial system. *McNabb v. United States*, 318 U. S. 332, 341, 345 (1943). To the extent that the exclusionary rule rested upon the rule-making power of the Court and Congress it would presumably be subject to either Congressional or judicial modification. cf. *Mapp v. Ohio*, 367 U. S. at 661 (concurring opinion); *Wolf v. Colorado*, 338 U. S. 25, 33 (1949). Accordingly, prior to this Court's decision in *Mapp* there was some basis for assuming that the exclusionary rule might be subject to the provisions of the federal harmless error statute. Fed. R. Crim. P. 52(a). See, e.g., *Kremen v. United States*, 353 U. S. 346, 348 (1956) (dissenting opinion); *United States v. McCall*, 291 F. 2d 859 (2d Cir. 1961).

The *Mapp* case, however, laid this problem to rest. The admission of illegally seized evidence over the objection of the accused was declared to be a violation of a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. Stressing the intimate relationship between the Fourth and Fifth Amendments, the Court described the use of unconstitutionally seized evidence as "tantamount to coerced testimony." (367 U. S. at 656.) The Court observed that whether the exclusionary right be derived from the Fourth, Fifth or Fourteenth Amendment, "the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." (367 U. S. at 657.) Thus the introduction of unconstitutionally seized evidence was placed in the same category as the introduction into evidence of a coerced confession, which had long been regarded as an unconstitutional trial procedure.

Such a procedural right, founded as it is on the Constitution itself, cannot be subjected to restrictions or conditions by state law. Yet the effect of the decision below is to deny petitioner his constitutional right to have illegally seized evidence excluded unless he can demonstrate prejudice. This is a condition that Connecticut has no more right to impose here than it would have in the case of a coerced confession. An accused is entitled to be tried according to constitutional standards and if those standards are not met the conviction cannot be sustained. See *Rogers v. Richmond*, 365 U. S. 534, 545 (1960).

C. The Reasons Underlying the Doctrine of Exclusion Are Incompatible with the Concept of "Harmless Error."

The constitutional right of an accused to require exclusion of illegally seized evidence is a deterrent to official lawlessness and a protection against state invasions of the

constitutional right of privacy. Its objective is not to punish officials for past misconduct in proportion to the harm caused to the accused, but rather to destroy the incentive for future constitutional violations. *Elkins v. United States*, 364 U. S. 206, 217 (1960). Accordingly, its application is just as necessary where the fruits of the invasion have negligible evidentiary value as where the seized evidence is essential to the conviction. The majority of the Court were clearly of that opinion in *Kremen v. United States*, 353 U. S. 346 (1956), which was decided at a time when the exclusionary doctrine was regarded by some as only a judicial rule. And, if the harmless error doctrine was not applicable then, it would indeed be anomalous to apply it now after the doctrine of exclusion has been recognized as a constitutional mandate.*

A second reason often given for the doctrine of exclusion is "the imperative of judicial integrity." *Elkins v. United States*, 364 U. S. 206, 222 (1960). Mr. Justice Stewart there summed up the eloquence of the past:

"'For those who agree with me,' said Mr. Justice Holmes, 'no distinction can be taken between the Government as prosecutor and the Government as judge.' 277 U. S., at 470. (Dissenting opinion.) 'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself;

*The possible applicability of the harmless error doctrine was considered by the Court in the *Kremen* case. Justices Burton and Clark dissented partly on the ground that, "... if any items were illegally seized their effect should be governed by the rule of harmless error since there was ample evidence of guilt otherwise." 353 U. S. at 348.

it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' 277 U. S., at 485. (Dissenting opinion.)

"This basic principle was accepted by the Court in *McNabb v. United States*, 318 U. S. 332. There it was held that 'a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' 318 U. S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." (364 U. S., at 222-3)

Mapp v. Ohio teaches that the admission of illegally seized evidence at the trial is a violation by the trial court itself of the constitutional rights of an accused. The problem is now one of direct judicial disobedience to the Constitution, and not merely an indirect judicial approbation of a violation of the constitutional right of privacy by ill trained or lawless police officials. If our trial courts are adjured not to place the stamp of judicial approval upon the illegal acts of law enforcement agencies, still less should our appellate courts gloss over a disregard of constitutional rights by the trial court itself. What lesson will our courts teach if they can dismiss their own disregard of constitutional rights as harmless? The harm done to the accused may indeed be slight, but the harm done to the reputation of our courts as the guardians of our constitutional rights is irreparable. Integrity is not a matter of degree.

The right course is that which has unhesitatingly been followed by the Courts of Appeals for the District of Columbia and for the Eighth Circuit. *Williams v. United States*, 263 F. 2d 487, 490, 491 (D. C. Cir. 1959); *Honig v. United States*, 208 F. 2d 916, 921 (8th Cir. 1953). In the words of Judge Danaher in his concurring opinion in the *Williams* case:

"If, perchance, the police are not familiar with the rules, the prosecutor is, or is presumed to be. The opinions referred to have cited many other cases which he should recognize. It is the duty of the prosecutor to know not only whom to prosecute, but *when*. Thus, in the course of preparation of his case for trial, absent 'exceptional circumstances,' seldom found, the prosecutor should appraise the available evidence and should apply the rules. Unhesitatingly he should refuse to go forward with the presentation of evidence which has been obtained by illegal police invasion of a private home. If his case *depends* upon such evidence, he should dismiss the prosecution. If he can present a case without the use of evidence illegally procured, it should not be offered. But if notwithstanding, he insists upon introducing evidence illegally gained through improper invasion of the sanctity of a dwelling, we should tell him once again and for all, we will reverse a conviction, as we now do." 263 F. 2d at 491.

The contrary view adopted by the court below makes the constitutional rights of the accused dependent upon his ability to demonstrate the prejudicial effect of the unlawful evidence on the outcome of the trial. That view is inconsistent with this Court's long standing practice with respect to the protection of similar fundamental rights; it is inconsistent with the function of the exclusionary doctrine as a deterrent to official lawlessness; and it compromises the integrity of our courts. We submit, therefore, that this case

should be reversed on the ground that the conviction has been vitiated by an error of constitutional dimension.

II.

PETITIONERS WERE DEPRIVED OF THE FAIR TRIAL REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Both reason and precedent seem to lead inescapably to the conclusion that an error of constitutional dimension ought never to be regarded as harmless. Conceivably, a case might one day arise in which the unconstitutional evidence admitted in the trial was utterly innocuous and undebatably lacking in any capacity to influence the finder of fact. In such a case the element of incrimination would be lacking, and the relationship to Fifth Amendment safeguards would fade. The argument that principle should yield to pragmatism might then gather some force. However, if there are such hypothetical limits to the doctrine of exclusion, they are certainly not reached in this case, for here the contaminated evidence was clearly incriminating and its impact permeated the entire trial.

As this record indicates, the uses to which illegally obtained evidence may be put are impressive in their variety and subtlety. If the findings of the trial court are examined, it is immediately apparent that the unlawful evidence was not only considered as tending to establish guilt but also formed the foundation for the admission of other damaging evidence of guilt. The trial court expressly found that:

"8. In searching the car in which the defendants were riding, the officer found a can of black paint and a two-inch paint brush.

* * * * *

13. The police found the same can of black paint and the brush in the car which the defendants had been operating when stopped by Officer Lindwall earlier in the morning.

14. The two-inch paint brush matched the markings made with black paint upon the synagogue." (R. 12).

It must be borne in mind that even a minor bit of tangible evidence may be the very element that gives another witness's testimony the ring of truth in the ears of a skeptical trier of fact. Here the tangible evidence, incriminating in itself, was also used to corroborate testimony of the police officer as to the presence of the petitioner near the scene of the crime at about the time it was committed and as to the presence of a paint jar and paint brush in petitioner's car at that time. The evidence was used again as the subject of opinion testimony to the effect that the paint brush and paint found in petitioner's possession matched the markings on the synagogue, thus forging another link between the accused and the crime charged.

This Court has repeatedly employed the doctrine referred to as "fruit of the poisonous tree" in order to exclude evidence lawfully obtained but which is the proximate result of evidence unlawfully seized, *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920); *Nardone v. United States*, 308 U. S. 338 (1939). The use of such evidence to demonstrate the relationship of other evidence to the crime, or even to lend credence to otherwise unsubstantiated testimony, is certainly a fruit of the unconstitutional search and seizure, and the quoted findings are likewise a direct product of the use of illegally obtained evidence.

Thus, the introduction of such evidence has effects far beyond its own intrinsic evidential force. Another such effect is the impact of the evidence upon the accused in

determining the course of his defense. This is illustrated by the following findings of the trial court:

"15. Both defendants admitted that they were the ones who had painted the swastikas on the synagogue and they admitted that the paint and the brush found in the car had been used by them for that purpose." (R. 12)

18. Detective Frank Tigano was permitted, over objection, to give his opinion concerning the material used to paint the Temple without any foundation being laid for such questioning and without qualifying Detective Tigano as an expert.

19. Detective Frank Tigano did testify that the swastikas had been marked upon the synagogue with a type of black paint. Subsequently, both defendants admitted that they had used the black paint found in their car for that purpose." (R. 13)

The admissions reflected in these findings bear mute testimony to the devastating effects which accompany denial of constitutional safeguards. The concept of ordered liberty embodied in the Fourteenth Amendment demands that no person be so placed, by violation of his constitutional rights, that self-incrimination becomes a practical if not a legal necessity. Admission of the paint brush and the paint jar and their subsequent use to support and corroborate other evidence so cemented the prosecution's case that petitioner was left no alternative but to take the stand, admit his responsibility for painting the synagogue and try to establish that the nature of his acts was not within the scope of the felony statute under which he had been charged.

Such consequences are not uncommon,* for it must be borne in mind that we are not dealing here with a mere

*See, e.g., *United States v. McCall*, 291 F. 2d 859 (2d Cir. 1961) (having failed to exclude the evidence, and having failed to shake the expert testimony based thereon, accused took the stand and testified in mitigation).

technicality but rather with the denial of the fundamental right of the petitioner to have the contaminated evidence excluded. The natural effect of such a denial is prejudice to the accused. *Kotteakos v. United States*, 328 U. S. 750, 764-5 and note 19 (1946); cf. *United States v. Mineworkers*, 330 U. S. 258, 376 (1947) (dissenting opinion). Therefore the applicable rule is that announced in *Bram v. United States*, 168 U. S. 532, 541 (1897):

"Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." 168 U. S. at 541.

Accordingly, if the error itself is a departure from a constitutional norm, then, "An appellate court will not presume to evaluate the degree of prejudice in probativeness from relevant evidence obtained by illegal search and seizure whether the relevance of such evidence be immediate or remote. And no more will it undertake to appraise the effect of any irrelevant evidence so obtained and used where such evidence, though not relevant to the offense charged, is nevertheless not utterly innocuous but can debatably be said to be possessed of some capacity to influence a jury." *Honig v. United States*, 208 F. 2d 916, 921 (8th Cir. 1953).

In this case, the unlawfully seized paint brush and paint can were offered by the prosecution for the avowed purpose of proving guilt. They were relevant to the issue of guilt.

They were found by the trial court to be admissible on the issue of guilt. They were not ignored or disregarded but were considered by the court, as the trier of fact, and expressly mentioned in its findings. Furthermore these exhibits were the subject of testimony of other witnesses, which testimony was offered for the purpose of proving guilt, admitted for that purpose, considered for that purpose and relied upon for that purpose in the finding of the trial court. Like the proverbial one rotten apple in a barrel; the contaminated evidence spread its poison by adding force to other evidence until the accused was compelled to adopt the tactics of retreat and abandon his privilege against self-incrimination. Under such circumstances the use of the unconstitutional evidence cannot be dismissed as inconsequential regardless of how much other evidence of guilt may have been in the record.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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August 23, 1963